

HONORABLE KYMBERLY K. EVANSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REC ROOM, INC.,

Plaintiff,

v.

M.Z.,

Defendants.

Case No. 2:23-cv-01586-KKE

PLAINTIFF REC ROOM, INC.’S
RESPONSE TO ORDER TO SHOW
CAUSE

I. INTRODUCTION

On April 1, 2024, this Court issued an Order to Show Cause directing Rec Room to “explain under what authority M.Z. has the capacity to be sued consistent with Federal Rule of Civil Procedure 17(b)(1) and whether the Court must appoint a guardian *ad litem* under Federal Rule of Civil Procedure 17(c)(2).” Dkt. No. 20. As set out in greater detail below, M.Z. has the capacity to be sued under Fed. R. Civ. P. 17(b)(1) because the law of his domicile, British Columbia, permits minors to be sued when they commit actionable wrongs. The Court need not appoint a guardian *ad litem* at this time, because Defendant’s mother has the capacity to defend on his behalf. Fed. R. Civ. P. 17(c)(1). The question of whether a guardian *ad litem* is needed,

1 moreover, may be rendered moot by the arrival of M.Z.’s eighteenth birthday, which should
 2 occur soon.

3 **II. RELEVANT FACTS**

4 The complaint was filed on October 17, 2023 [Dkt. No. 1] asserting causes of action
 5 against M.Z., a British Columbia-domiciled minor, for breach of contract, fraudulent
 6 inducement, copyright infringement, circumvention of technological protection measures, and
 7 tortious interference with contractual relations. On October 28, 2023, summons and copy of the
 8 complaint were served on M.Z. by personal service on his mother, Olga Plotnikova. Dkt. No. 15.

9 Plaintiff Rec Room’s counsel had multiple discussions with Ms. Plotnikova regarding
 10 this matter over the last six months, including discussions on both November 27, 2023 and
 11 February 26, 2024. Schmeyer Dec. ¶ 2-3. On March 18, 2024, the Court received and docketed a
 12 document from Ms. Plotnikova dated March 12, 2024, which Ms. Plotnikova represented
 13 contained her “son’s answer to this legal claim,” and which Ms. Plotnikova asked be filed “as
 14 court appearance.” Dkt. No. 19.

15 On April 1, 2024, the Court issued an Order to Show Cause directing Rec Room to
 16 “explain under what authority M.Z. has the capacity to be sued consistent with Federal Rule of
 17 Civil Procedure 17(b)(1) and whether the Court must appoint a guardian *ad litem* under Federal
 18 Rule of Civil Procedure 17(c)(2).” Dkt. No. 20.

19 **A. M.Z. HAS THE CAPACITY TO BE SUED UNDER FED. R. CIV. P. 17(B)(1) 20 BECAUSE HE HAS THE CAPACITY TO BE SUED UNDER BRITISH 21 COLUMBIA LAW.**

22 Although M.Z. is a minor, he has the capacity to be sued. “Capacity to sue or be sued is
 23 determined . . . for an individual who is not acting in a representative capacity, by the law of the
 24 individual’s domicile.” Fed. R. Civ. P. 17(b)(1). M.Z. is a domiciliary of British Columbia. *See*
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1 Complaint, Dkt. No. 1 at ¶ 17. His capacity to be sued must therefore be determined under
 2 Canadian law, and specifically under British Columbia law.

3 British Columbia law permits minors to be sued when they commit actionable wrongs.
 4 McGowan Decl., at ¶ 2.¹ As is true in a number of other common law jurisdictions, minors are
 5 not excused from suit purely on the basis of their age, although they are in cases of tort judged
 6 based on what is reasonably expected from an individual of their age. Simply put, in British
 7 Columbia, a minor's age does not excuse them from being held accountable for the harms they
 8 cause when they are "old enough to know better." *See, e.g., Hatfield et al. v. Pearson et al.*, 1956
 9 CanLII 307 (BC SC) *5, 1 DLR (2d) 745, 750 (included as Ex. 1 to McGowan Decl.). In this
 10 light, at least one Canadian appellate court has affirmed the conviction of a minor for criminal
 11 copyright infringement in a case where the minor ran a computer bulletin board that distributed
 12 infringing copies of computer software. *See R. v J.P.M.*, 1996 CanLII 8701 (NS CA) (included
 13 as Ex. 2 to McGowan Decl.).

14 Further confirmation of the capacity of minors to be sued under British Columbia law can
 15 be found in British Columbia's *Infants Act*. McGowan Decl. Ex. 3. Section 48 of the *Infants*
 16 *Act*, which is discussed further below in response to the Court's inquiry regarding the
 17 appointment of a guardian *ad litem*, sets out the procedures to be used for service of process
 18 when a minor is served with process in a proceeding brought against them. Such procedures
 19 would not be necessary if minors lacked capacity to be sued.
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25 ¹ Mr. McGowan is a lawyer admitted to practice in Canada and his testimony as well as the
 26 Canadian and British Columbian materials attached to his declaration can be considered by the
 Court in determining the applicable law of British Columbia. Fed. R. Civ. P. 44.1.

1 M.Z. has capacity to be sued under British Columbia law, and therefore may be sued in
 2 the United States pursuant to Fed. R. Civ. P. 17(b)(1).

3 **B. THE COURT NEED NOT APPOINT A GUARDIAN *AD LITEM* BECAUSE**
 4 **M.Z.’S MOTHER MAY DEFEND ON HIS BEHALF, AND HAS STEPPED**
 5 **FORWARD TO DO SO.**

6 The appointment of a guardian *ad litem* is “normally left to the sound discretion of the
 7 trial court.” *United States v. 30.64 Acres of Land, More or Less, Situated in Klickitat Cnty., State*
 8 *of Wash.*, 795 F.2d 796, 804 (9th Cir. 1986). The appointment of a guardian *ad litem* is required
 9 when a minor or incompetent person is unrepresented in an action. Fed. R. Civ. P. 17(c). And
 10 although the Court need not appoint a guardian *ad litem* if the Court determines that the person
 11 in question is adequately represented, the Court is required “to take whatever measures it deems
 12 proper to protect an incompetent person during litigation.” *30.64 Acres of Land*, 795 F.2d at 804.

13 As applied here, although Rec Room does not oppose the appointment of a guardian *ad*
 14 *litem*, it believes that the court is not required to do so because M.Z.’s mother – his general
 15 guardian – may defend on his behalf. If the Court believes that the formal appointment of a
 16 guardian *ad litem* is required here, the appointment of M.Z.’s mother, Olga Plotnikova, would be
 17 both permissible and appropriate under both American and Canadian law. And, in any event, the
 18 question may be rendered moot by the arrival of M.Z.’s 18th Birthday, which will occur soon.
 19 Tewson Decl. However, if the Court requires the appointment of an independent guardian *ad*
 20 *litem* in this case, Rec Room will take whatever measures the court requires to that end.

21 The appointment of a guardian *ad litem* is not necessary at this juncture because M.Z.’s
 22 mother has the capacity to defend the action on M.Z.’s behalf and has submitted an answer to the
 23 complaint. “The court must appoint a guardian *ad litem* – or issue another appropriate order – to
 24 protect a minor or incompetent person who is unrepresented in an action.” Fed. R. Civ. P.
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1 17(c)(2). However, Rule 17 also provides that “a general guardian” “may sue *or defend* on
 2 behalf of a minor.” Fed. R. Civ P. 17(c)(1)(A) (emphasis added).

3 Courts have declined on these grounds to appoint guardians *ad litem* in cases where no
 4 conflicts of interest are present and a parent is capable of protecting a minor’s interests. *See, e.g.*
 5 *Principal Life Ins. Co. v. Est. of Diaz*, No. 1:23-CV-00261-CDB, 2023 WL 7284874, at *3-4
 6 (E.D. Cal. Nov. 2, 2023) (collecting cases and denying plaintiff’s motion to appoint defendant
 7 parent as guardian *ad litem* for her defendant children as moot on grounds that the appointment
 8 was unnecessary because the mother could represent her children’s interests where there was no
 9 conflict of interest). And:

11 “where the complaint or claim has been served on the parent of a minor, and there
 12 is no indication that the parent would not or could not represent the minor’s
 13 interest, courts are not required to appoint a guardian *ad litem* to represent the
 14 minor even if the claim be lost by default.”

15 *Seibels, Bruce & Co. v. Nicke*, 168 F.R.D. 542, 544 (M.D.N.C. 1996) (citing *In the Matter of*
 16 *Chicago, Rock Island and Pacific R. Co.*, 788 F.2d 1280 (7th Cir.1986). This is appropriate both
 17 because “a federal court should, as a matter of sound policy, be cautious in attempting to step
 18 between the parent and his or her child,” and because “the Court may have a very limited ability
 19 to do so especially if the minors will not be made available to the guardian and/or reside out of
 20 state.” *Id.* In such cases, Rule 17 allows the Court “to rely upon a fundamental assumption on
 21 which our society rests, that parents are concerned about the welfare of their children.” *United*
 22 *States v. Noble*, 269 F. Supp. 814, 816 (E.D.N.Y. 1967) (appointing father who had already
 23 defaulted in action as guardian *ad litem* for defendant children, and ordering default if he did not
 24 consent to act as such).

1 In this case, there is every reason to believe that Ms. Plotnikova can appropriately
 2 represent her son. First, it is her legal duty under British Columbia law to do so. British
 3 Columbia's *Infants* Act provides that the appropriate means of initiating a proceeding against a
 4 minor is through service on "a guardian resident in British Columbia." McGowan Decl., Ex. 3 at
 5 § 48(1). Ms. Plotnikova was personally served on October 27, 2023. Raiman Aff, Dkt. No. 15 at
 6 1-3. Under the Infants Act, "from the time of service the person served is guardian, for the
 7 proceeding, of the infant and must promptly attend to the infant's interests and do the things
 8 necessary to protect the infant's interests." McGowan Decl., Ex.3 at § 48(2).

10 Second, Ms. Plotnikova is taking actions in this case. In addition to submitting an answer
 11 to the complaint on M.Z.'s behalf, which indicates that she intends to defend the action, she has
 12 also participated with plaintiffs in numerous discussions regarding potential settlement, as well
 13 as in a Rule 26 meet and confer. Schmeyer Decl., ¶¶ 2-4.

15 Because Ms. Plotnikova is able to adequately represent her son's interests, the
 16 appointment of a guardian *ad litem* is unnecessary. In the alternative, Ms. Plotnikova's
 17 appointment as guardian *ad litem* would be also appropriate if the Court wishes to make a formal
 18 appointment of a guardian *ad litem*. *Pickett v. Liberty Mut. Ins. Co.*, No. 2:20-CV-0426-TOR,
 19 2021 WL 7543701, at *2 (E.D. Wash. Feb. 19, 2021).

21 **C. M.Z.'S EIGHTEENTH BIRTHDAY IS OCCURRING SOON.**

22 Finally, Rec Room has uncovered additional information regarding M.Z.'s age that may
 23 be relevant to the Court's determination here. Although Rec Room believed M.Z. to be
 24 "approximately 16 years of age" at the time of filing of the complaint [Dkt. No.1 at ¶ 17], Rec
 25 Room has conducted additional post-filing investigation. As detailed in the Declaration of
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1 Kathryn Tewson (“Tewson Decl.”) that accompanies this Response, it turns out that M.Z. will
 2 reach the age of 18 years old soon. Tewson Decl., ¶¶ 3-14.

3 Under British Columbia’s Age of Majority Act, M.Z. will not attain the age of majority
 4 until he turns 19. McGowan Decl., Ex 4. It is not clear, however, that this would require that he
 5 be represented by either a general guardian or guardian *ad litem* until that time. “The Rule
 6 [17(b)] merely sets forth the basis for determining the capacity of a party to sue or be sued in his
 7 or her own name in the federal district courts.” *Valedon Martinez v. Hosp. Presbiteriano de la*
 8 *Comunidad, Inc.*, 806 F.2d 1128, 1134 (1st Cir. 1986). Here, as discussed *supra*, M.Z. has the
 9 capacity under the law of his domicile to be sued in his own name regardless of whether he has
 10 reached the age of majority. The question of whether there is a need for the appointment of a
 11 guardian *ad litem* is independent of capacity, and for the Court’s determination. *See Donnelly v.*
 12 *Parker*, 486 F.2d 402, 407 (D.C. Cir. 1973) (the only effect of a party's incompetence upon
 13 maintenance of the action is the possible need for appointment of a guardian *ad litem* or entry of
 14 a protective order)
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17 **III. CONCLUSION**

18 M.Z. has the capacity to be sued under British Columbia law, which determines whether
 19 he can sue or be sued in his own name under Fed. R. Civ. P 17(b)(1). The Court need not appoint
 20 a guardian *ad litem* because his general guardian is capable of defending on his behalf, but may
 21 appoint either his mother or another individual as guardian *ad litem* at the Court’s discretion.
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1 Respectfully submitted this 19th day April, 2024.

2 I certify that this pleading contains 2,038 words, in
3 compliance with the Local Civil Rules.

4 /s/ Brian W. Esler

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the parties and to the following:

Defendant M.Z.
c/o Olga Plotnikova
Email: oplotnikova@gmail.com

(Per Jan. 25, 2024 agreement to accept email service)

DATED this 19th day of April, 2024.

/s/ Kristin Martinez Clark
Kristin Martinez Clark